IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al*,

Plaintiffs,

v.

TYSON FOODS, INC., *et al*,

Defendants.

CASE NO. 05CV0329JOE-SAJ

TYSON POULTRY, INC.'S MOTION TO DISMISS COUNT 3 OF PLAINTIFFS' FIRST AMENDED COMPLAINT AND INTEGRATED OPENING BRIEF IN SUPPORT

Respectfully submitted,

Patrick M. Ryan, OBA # 7864
Stephen L. Jantzen, OBA # 16247
RYAN, WHALEY & COLDIRON, P.C.
900 Robinson Renaissance
119 North Robinson, Suite 900
Oklahoma City, OK 73102
(405) 239-6040 (phone)
(405)239-6766 (fax)
(405) 239-6766
e-mail: pryan@ryanwhaley.com
e-mail: sjantzen@ryanwhaley.com

October 3, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

COMES NOW Defendant Tyson Poultry, Inc. joined by Tyson Foods, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. (collectively, the "Tyson Defendants"), by and through their attorneys, and, in accordance with FED.R.CIV.P. 12(b)(1), 12(b)(6), and LCvR7.1, hereby move this Court to enter an order dismissing Count 3 of Plaintiffs' First Amended Complaint alleging claims arising under the Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*, ("RCRA").[1] As support for their Motion, the Tyson Defendants state the following.

I. INTRODUCTION

This action was initiated by the filing of a Complaint by the State of Oklahoma, ex rel. W. A. Drew Edmonson, in his capacity as Attorney General for the State of Oklahoma ("the State"), and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma (collectively, "Plaintiffs"). Plaintiffs subsequently filed their First Amended Complaint in which the State expanded its claims against Defendants to include alleged violations of RCRA. Specifically, the Plaintiffs' First Amended Complaint contains a new Count 3 asserting a RCRA citizen suit claim against Defendants for allegedly creating "an imminent and substantial endangerment to health or the environment" through their "contribution" to the "handling, storage, treatment, transportation or disposal of poultry waste in the [Illinois River Watershed ("IRW")] and the lands and the waters therein." *See id.* at ¶ 95.

[1] The State describes its claims in Count 3 as arising under the "Solid Waste Disposal Act." However, after amendment by Congress in 1976, this Act is more commonly referred to as the Resource Conservation and Recovery Act. *See e.g., American Mining Cong. v. U. S. Nuclear Regulatory Comm'n*, 902 F.2d 781, 784 (10th Cir. 1990) (citing the Solid Waste Disposal Act, "as amended and termed, the Resource Conservation and Recovery Act ("RCRA")).

However, as explained in the following discussion, this Court must dismiss the State's RCRA citizen suit for failure to state a claim upon which relief may be granted and/or for lack of subject matter jurisdiction because: (1) the State failed to satisfy RCRA's citizen suit notice requirements which are mandatory preconditions for commencing suit; and (2) the State is not a proper party to bring a RCRA citizen suit under these circumstances.

II. LEGAL STANDARD

As a general rule, a district court should first determine whether it has subject matter jurisdiction over a claim before attempting to resolve any other issues. *See Deniz v. Municipality of Guaynabo*, 285 F.3d 142, 149-50 (1st Cir. 2002). The determination of the district court's subject matter jurisdiction is a question of law. *See Salt Lake Tribune Publ'g Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1095 (10th Cir. 2003). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action." FED.R.CIV.P. 12(h)(3). When a defendant moves to dismiss an action for lack of subject matter jurisdiction, the plaintiff must respond with evidence establishing that the court has jurisdiction over the dispute. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998); *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir.1990).

A Rule 12(b)(6) motion requires the court to consider whether a plaintiff's pleadings are legally sufficient to state a claim upon which relief may be granted. *See Yanaki v. Iomed, Inc.*, 415 F.3d 1204, 1211 (10th Cir. 2005). When considering a motion to dismiss, it is not proper for the court to assume that the plaintiff can prove facts not alleged in the pleadings "or that the defendants have violated the…laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). Dismissal is appropriate if the court determines that the plaintiff can prove no set of facts which

would entitle him to relief. *See Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1244 (10th Cir. 1999). To survive dismissal, a plaintiff must assert a cognizable claim and allege facts that, if true, would support such a claim. *See Boddie v. Schnieder*, 105 F.3d 857, 860 (2d Cir. 1997).

III. ARGUMENT

THIS COURT MUST DISMISS THE STATE'S RCRA CLAIM BECAUSE THE STATE HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AND/OR BECAUSE THIS COURT DOES NOT HAVE JURISDICTION TO HEAR THE STATE'S RCRA CLAIM.

A. The State's RCRA Claim Must Be Dismissed Because the State Failed to Comply with the Mandatory Notice Requirements for RCRA Citizen Suits.

RCRA authorizes any person to commence a "citizen suit" under three scenarios: (1) against any person, for alleged violations of any permit, standard, regulation, condition, requirement, or order, which has become effective pursuant to RCRA; (2) against any person, where such person's solid or hazardous waste practices may present an imminent and substantial endangerment to health or the environment; or (3) against the United States Environmental Protection Agency ("EPA"), where the EPA Administrator has failed to perform any nondiscretionary act. *See* 42 U.S.C. § 6972(a). In the present case, the State has initiated a citizen suit against Defendants only upon the second of these scenarios, alleging that:

> an imminent and substantial endangerment to health or the environment may be presented and is in fact presented as a direct and proximate result of each of the Poultry Integrator Defendants' respective contribution to the handling, storage, treatment, transportation or disposal of poultry waste in the IRW and lands and waters therein.

First Amended Complaint, ¶ 95.

At least ninety (90) days prior to commencing a citizen suit under section 6972(a)(1)(B) of RCRA, a plaintiff must provide the potential defendant "notice of the endangerment," and his intent to bring suit. *See* 42 U.S.C. § 6972(b)(2)(A). Notice must also be provided to EPA and

certain designated officials in the state(s) in which the alleged endangerment occurs. *See id*. The notice and delay requirements are "**mandatory** conditions precedent to commencing suit." *Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989) (emphasis added) (interpreting the notice and delay requirements for a RCRA section 6972(a)(1)(A) citizen suit); *see also New Mexico Citizens for Clean Air & Water v. Espanola Mercantile Co., Inc*., 72 F.3d 830, 833 (10th Cir. 1996) (requiring "strict adherence to [notice] procedural requirements" and holding that compliance with the notice requirements "is a mandatory precondition to suit"). Accordingly, "where a party suing under the citizen suit provisions of RCRA fails to meet the notice…requirements of § 6972(b), the district court must dismiss the action as barred by the terms of the statute." *Hallstrom*, 493 U.S. at 33.

Neither RCRA nor its implementing regulations provide any specific guidance regarding the notice requirements applicable to a § 6972(a)(1)(B) citizen suit alleging an imminent and substantial endangerment to health or the environment. *See* 42 U.S.C. § 6972(a)(1)(B), (b)(2)(A); 40 C.F.R. § 254.3.[2] Nonetheless, important guidance can be found in the general public policies served by citizen suit notice provisions, and from the notice requirements applied to citizen suits alleging RCRA violations. *See, e.g., Agricultural Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co.*, 878 F. Supp. 1091, 1100 (N.D. Ill. 1995) (notice requirements for citizen suits alleging RCRA violations are applicable to a RCRA citizen suit alleging "imminent and substantial endangerment"). Regarding the notice requirements applied to citizen suits

[2] According to 40 C.F.R. § 254.1, the "purpose of [Part 254 (Prior Notice of Citizen Suits)] is to prescribe procedures governing the notice requirements of subsections (b) and (c) of section 7002 as a prerequisite to the commencement of such actions." Subsection (b) of section 7002 contains the notice requirements applicable to *both* Section (a)(1)(A) "RCRA violation" *and* Section (a)(1)(B) "endangerment" citizen suits. However, there are no additional requirements in Part 254 which are directed specifically to subsection (a)(1)(B) "endangerment" citizen suits.

alleging RCRA violations under §6972(a)(1)(A), EPA regulations require the notice to include:

> sufficient information to permit the recipient to identify the specific permit, standard, regulation, condition, requirement, or order which has allegedly been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of the violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 254.3(a).

With respect to the general public policies served by citizen suits, Congress included citizen suit notice provisions in each of the major federal environmental statutes to "strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom*, 493 U.S. at 29. The notice requirements of citizen suits are designed to:

(1) allow "[g]overnment agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits" and

(2) "give the alleged violator an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit."

Id.; *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

Courts have noted the importance of each of these twin aims of the citizen suit notice provisions. As to the first goal, the "purpose of the [required] notice is to provide the agencies and the defendant with information on the cause and type of environmental laws or orders the defendant is allegedly violating so that the agencies can step in, investigate, and bring the defendant into compliance. The point is to trigger agency enforcement and avoid a lawsuit." *Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 953 (9th Cir. 2002). As to the second goal, "[t]he key language in the notice regulation is the phrase 'sufficient information to permit the recipient to identify' the alleged violations and bring itself

into compliance." *Id.* at 951.

On or about March 9, 2005, the Oklahoma Attorney General, on behalf of the State of Oklahoma, served Defendants with a "Notice of Intent to File Citizen Suit Pursuant to the Solid Waste Disposal Act, 42 U.S.C. § 6972(a)(1)(B)" (the "State's RCRA Notice," attached as Exhibit "1" hereto, and as Exhibit "5" to the State's First Amended Complaint). *See* First Amended Complaint, ¶ 91. As explained more fully below, the State's RCRA Notice fails because it does not satisfy the content and service requirements for notice of RCRA citizen suits. Because the State has failed to satisfy these mandatory notice requirements, *Hallstrom* requires dismissal of Count 3 of the State's First Amended Complaint. *See id., 493 U.S.* at 33.

1. The State's RCRA Notice is Barred by Statute Because the State Failed to Notify the Appropriate Regulatory Agency in Arkansas of the Alleged "Imminent and Substantial Endangerment."

"As a general rule, if an action is barred by the terms of a statute, it must be dismissed." *Hallstrom*, 493 U.S. at 31. RCRA provides that "[n]o action may be commenced under subsection (a)(1)(B) of this section" until the plaintiff has given notice of the endangerment to the alleged violator, the Administrator of the EPA, and "the State in which the alleged endangerment may occur." *See* 42 U.S.C. § 6972(b)(2)(A)(i-iii). Specifically, EPA's regulations provide that:

> [a] copy of the notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, **and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred**.

40 C.F.R. § 254.2(a)(1) (emphasis added) Where the alleged endangerment may occur in more than one state, this notice requirement should be read to apply to both states. *See generally Greenpeace, Inc. v. Waste Tech. Indus.*, 1993 WL 134861, *6, No. 4:93CV0083 (N.D. Ohio

Mar. 5, 1993) (recognizing that "when a facility has an impact beyond the border of the state of location, more than one state is implicated, and the meaning of 'the State' becomes critical" to the application of RCRA's citizen suit provisions).

The State's RCRA Notice alleges the existence of an endangerment within "the Illinois River Watershed located in northeastern Oklahoma **and northwestern Arkansas…**" State's RCRA Notice, at 2 (emphasis added). In light of this allegation, the plain language of RCRA and its implementing regulations required the Oklahoma Attorney General to provide a copy of the State's RCRA Notice to the Director of the Arkansas Department of Environmental Quality ("ADEQ") at least ninety days prior to filing a citizen suit. *See* 42 U.S.C. § 6972(b)(2)(A); 40 C.F.R. § 254.2(a)(1); ARK. CODE ANN. § 8-1-202(a) (the Director of ADEQ is the executive head of the agency); ARK. CODE ANN. § 8-6-207(a)(1) (ADEQ has authority "[t]o administer and enforce all laws, rules, and regulations relating to solid waste disposal"). However, the State filed its First Amended Complaint without ever providing ADEQ with a copy of the State's RCRA Notice. *See* State's RCRA Notice, at 5-6 (listing of parties receiving notice).[3]

Courts strictly construe RCRA's procedural requirements for citizen suits because petitioners have "full control" over the timing of their suit. *See Hallstrom*, 493 U.S. at 27; *New Mexico Citizens for Clean Air and Water*, 72 F.3d at 832-33. When a "procedural default is caused by petitioners' 'failure to take the minimal steps necessary' to preserve their claims," "equities do not weigh in favor of modifying statutory requirements." *Hallstrom*, 493 U.S. at 28. By failing to provide the Director of ADEQ with notice of its RCRA citizen suit, the State failed

[3] According to the service listing, the State's RCRA Notice was only provided to the Governor of Arkansas. In contrast, the State properly served the State's RCRA Notice on the Executive Director of the Oklahoma Department of Environmental Quality, as well as the Commissioner of Agriculture and Governor of Oklahoma.

to take the "minimal steps necessary to preserve" its claim. *Id.* Moreover, the State's citizen suit is barred by the express terms of RCRA's citizen suit provision. *See* 42 U.S.C. § 6972. ("No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to…the State in which the alleged endangerment may occur…").

Consequently, this Court must dismiss Count 3 of Plaintiffs' First Amended Complaint, for lack of subject matter jurisdiction and/or for failure to state a claim upon which relief may be granted. *See Hallstrom*, 493 U.S. at 33 (holding that "where a party suing under the citizen suit provision of RCRA fails to meet the notice…requirements of § 6972(b), the district court must dismiss the action as barred by the terms of the statute"); *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943, 950 (9th Cir. 2002)(citing *Hallstrom* for the rule that district courts lack subject matter jurisdiction over actions in which plaintiffs fail to satisfy RCRA's citizen suit notice requirements); *In re: Voluntary Purchasing Groups, Inc. Litig.*, 2002 WL 32438760, *3 (N.D.Texas) (holding that a plaintiff's notice "must meet the statutory requirements for filing a suit under the RCRA statute for the [plaintiff] to survive a 12(b)(6) motion to dismiss"); *accord New Mexico Citizens for Clean Air and Water v. Espanola Mercantile Co., Inc.*, 72 F.3d 830, 833 (10th Cir. 1996) (requiring strict adherence to RCRA's citizen suit notice requirements).

2. The State's RCRA Notice is Legally Insufficient Because it Fails to Provide the Appropriate Regulatory Agencies and the Tyson Defendants with Sufficient Information as to the Alleged Endangerment and How the Tyson Defendants Can Achieve Compliance with RCRA.

The State's RCRA Notice generally alleges that "[p]oultry waste constitutes solid and/or hazardous waste pursuant to 42 U.S.C. § 6903(5) and § 6903(27)" and that the "Poultry Integrators have contributed and are continuing to contribute to the handling, storage and/or

disposal of solid and/or hazardous waste in a manner that may and does present an imminent and substantial endangerment to human health and the environment in the Illinois River Watershed…." *See* State's RCRA Notice, at 2 (attached as Exhibit "1" hereto). As support for these claims, the State's RCRA Notice further alleges that:

- Since approximately 1980, it has been the practice of the Poultry Integrators to dispose of this waste on lands within the IRW resulting in the release of this waste and associated pollutants, into the soils, groundwater and surface waters of the IRW – a practice which may and does present an imminent and substantial endangerment to human health and the environment in the IRW in violation of 42 U.S.C. § 6972(a)(1)(B) and applicable federal regulations. *Id*. at 2-3.

- The Poultry Integrators' waste management and disposal practices, combined with their failure to respond adequately to the continued release of poultry waste into the IRW, present an imminent and substantial endangerment to human health and the environment. *Id*. at 3.

- The Poultry Integrators have contributed to the past and present handling, storage, and disposal of solid or hazardous waste that presents an imminent and substantial endangerment to human health and the environment in the IRW. *Id*. at 3.

- The Poultry Integrators' waste management and disposal practices have caused and will continue to cause the migration of the pollutants throughout the waters and natural resources in the IRW [and] [t]hese conditions pose an imminent and substantial endangerment to human health and the environment. *Id*. at 3.

As explained above, courts recognize that the public policies served by the notice requirements for citizen suits alleging RCRA permit violations are equally applicable to RCRA citizen suits alleging an imminent or substantial endangerment. *See Agricultural Excess & Surplus Ins. Co.*, 878 F. Supp. at 1100. Therefore, assessing the adequacy of the State's RCRA Notice must begin with a consideration of the twin Congressional goals of providing Defendants with sufficient information to identify and abate the cause of the alleged endangerment, and to provide the appropriate regulatory agencies with sufficient information to initiate an enforcement action. *See Henry Bosma Dairy*, 305 F.3d at 953; *accord Hercules, Inc.*, 50 F.3d at 1249 (to

satisfy the content requirements for a citizen suit notice, plaintiffs' notice letter must adequately identify the bases for the complaint).

Based upon the generic, vague allegations in the State's RCRA Notice, it is impossible for the Tyson Defendants to identify the nature of the violations or harms the State alleges, or precisely when, where, and how those alleged violations or harms occurred. The State's RCRA Notice is patently insufficient in that it fails to provide the Tyson Defendants with sufficient information to identify the pertinent aspects of the alleged violation. Moreover,

> While the [notice provision] clearly requires something less than a thoroughly detailed account of every possible allegation…this does not relieve the plaintiff of the duty to provide as much information as possible…A general notice letter might prompt a violator or an agency to investigate the inchoate allegations and develop the information needed for a decision on how to proceed. But given the purposes of the notice requirement, this cannot be what Congress and the EPA had in mind. Citizen suit enforcement of environmental laws was intended to supplement agency enforcement. Furthermore, the notice requirement…provides a relatively short period in which an alleged violator may correct any problems and avoid a lawsuit. Allowing a plaintiff to provide minimal information in a notice letter before bringing suit would place a heavy burden on alleged violators and enforcement agencies alike, a burden inconsistent with the policy goals of the notice requirement as articulated in *Hallstrom.* Accordingly, this court interprets [citizen suit notice provisions] as **requiring the plaintiff to provide enough information to enable both the alleged violator and the appropriate agencies to identify the pertinent aspects of the alleged violations without undertaking an extensive investigation of their own**. To hold otherwise would frustrate the legislative intent behind the notice provision.

Atwell v. KW Plastics Recycling Div., 173 F. Supp.2d 1213, 1221-22 (M.D. Ala. 2001)[4] (emphasis added); *see also Atlantic States Legal Found., Inc., v. Stroh Die Casting Co.*, 116 F.3d

[4] Although *Atwell v. KW Plastics Recycling Div.* considered the notice provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, the court's reasoning is instructive because the notice provisions in RCRA are analogous to the notice provisions in the CWA. *See Hallstrom*, 493 U.S. at 22-23.

814, 819 (7th Cir. 1997) ("In practical terms, the notice must be sufficiently specific to inform the alleged violator about what he is doing wrong, so that it will know what corrective actions will avert a lawsuit…. The key to notice is to give the accused company the opportunity to correct the problem.")

The State's RCRA Notice fails to identify the specific "imminent and substantial endangerment to health or the environment" or to provide the Tyson Defendants with sufficient information to deduce this on their own. The State's RCRA Notice fails because: (1) it does not identify any specific harm or risk to human health or the environment; (2) it fails to identify specifically where the alleged imminent and substantial endangerment is occurring, instead alleging it is occurring somewhere within the million plus acres of the IRW;[5] (3) it does not allege a specific date of violation, instead making a general reference to more than 20 years of activities throughout the entire IRW; (4) it does not identify specific, acceptable land application thresholds for any poultry litter constituents, or any land application rule or regulation which the Defendants are allegedly violating; and (5) it does not identify the specific poultry litter application practices to which the State objects.[6]

The same sort of generalized allegations made by the Oklahoma Attorney General in the State's RCRA Notice were found to be inadequate in *Nat'l Parks Conservation Ass'n v. TVA*, 175 F. Supp.2d 1071 (E.D. Tenn. 2001). There, the plaintiff's notice letter alleged that the defendant had "regularly violated for at least the last five years, and continues at the present time to violate" the pertinent requirements. 175 F. Supp.2d at 1076. The *TVA* court found that the

[5] According to paragraph 22 of the First Amended Complaint, the IRW consists of 1,069,530 acres, of which approximately 576,030 acres are located in Oklahoma.

[6] Tyson Poultry assumes that the State does not object to land application practices which conform to the specific statutes and regulations the State has enacted or promulgated with respect to the land application of poultry litter. *See* OKLA. STAT. tit. 2, § 10-9.1 *et seq.*, and OKLA. STAT., tit. 2 § 9-201 *et seq*. However, the State's RCRA Notice is not clear on this issue.

notice letter "does not specify the dates of the alleged violations or identify at which sites the violations occurred. Rather, the notice only states that TVA has 'regularly violated' the standard 'for at least the last five years….'" *Id.* at 1077. According to the court, this statement did not provide the specificity which would be required for the recipient to determine when the alleged violations had occurred. *Id.*; *see also Sierra Club Ohio Chapter v. City of Columbus*, 282 F. Supp.2d 756, 769 (S.D. Ohio 2003) (reaffirming the rule that a "notice alleging that particular violations occurred 'continuously' or 'nearly daily' was insufficient to satisfy the statutory notice requirements because such language did not help the defendant identify any specific date or dates on which the alleged violations might have occurred").

The State's RCRA Notice suffers from numerous facial inadequacies which collectively make it impossible for the Tyson Defendants to determine the nature of the alleged endangerment and/or how to come into compliance with any standard or requirement for land application of poultry litter. Significantly, the State's RCRA Notice entirely avoids the question of whether and when land application of poultry litter as fertilizer can ever be considered "waste disposal" under the intended purposes of RCRA.[7] Simply put, it is unreasonable to allow the State's RCRA Notice to serve as "notice" of an unidentified endangerment created by alleged noncompliance with unidentified laws, regulations, or standards.

The State's RCRA Notice likewise fails to satisfy the second purpose of a RCRA citizen suit notice, *i.e.*, providing the appropriate regulatory agency with sufficient information to initiate an enforcement action. As explained above, the State's RCRA Notice does not identify what laws, regulations, or standards have been violated or even when or where the violations occurred. Without this basic information, the State's RCRA Notice is far too vague and general

[7] Defendants will contend that poultry litter is not a solid or hazardous waste under RCRA.

for any regulatory agency to make a determination regarding enforcement.

In sum, the State's RCRA's Notice fails to meet the requirements of *Hallstrom* or *Gwaltney* because it does not provide sufficient information for Tyson Defendants to identify and abate the alleged "imminent and substantial endangerment" or for regulatory agencies to properly assess whether to institute enforcement actions. Accordingly, the State's RCRA claim against Defendants must be dismissed for failure to satisfy RCRA's mandatory notice requirements. *See, e.g., U. S. Envtl. Prot. Agency v. Port Auth. of New York and New Jersey*, 162 F. Supp.2d 173, 186 (S.D.N.Y. 2001) (granting defendants' motion to dismiss plaintiff's complaint because plaintiff's RCRA notice letter failed to satisfy RCRA's mandatory content requirements for notices of intent to file a citizen suit).

B. The State's RCRA Claim Must Be Dismissed Because the State of Oklahoma is not a Proper Party to Bring a Citizen Suit Under RCRA Section 6972(a)(1)(B) .

Congress included citizen suit provisions within each of the major federal environmental statutes to provide the public with a mechanism for alerting the appropriate regulatory agencies about conditions that may warrant investigation. *See Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc*., 50 F.3d 1239, 1246 (3rd Cir. 1995). When Federal, State, and/or local agencies have failed to exercise their enforcement responsibilities, commencement of a citizen suit is intended to spur those agencies into action by providing them with an opportunity to "take responsibility for enforcing environmental regulations." *See id*. at 1249. The purpose of a citizen suit is to provide regulators "with information on the cause and type of environmental laws or orders the defendant is allegedly violating so [they] can step in, investigate, and bring the defendant into compliance. The point is to trigger agency enforcement and avoid a lawsuit." *Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 953 (9th Cir. 2002). In sum, Congress clearly intended citizen suits to "supplement not supplant"

governmental enforcement actions. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc*., 484 U.S. 49, 60 (1987).

Under this regulatory framework, the State of Oklahoma is not a proper party to bring the instant citizen suit because the State's claim supplants the enforcement system created by Congress and effectively stands the entire citizen suit procedure on its head. The State of Oklahoma has sought and obtained delegated authority under RCRA to promulgate and enforce regulatory standards under that Act. *See* OKLA. STAT. tit. 27A, § 2-10-101, *et seq*. Therefore, the State's RCRA citizen suit creates an anomalous situation in which the State of Oklahoma is pursuing a private citizen enforcement action which, under the objectives identified by Congress, is intended to prompt the State of Oklahoma to fulfill its regulatory duties. This type of nonsensical situation has been rejected by at least one district court. *See California v. Dep't of Navy*, 631 F.Supp. 584, 587 (N.D.Cal. 1986).

In *California v. Dep't of Navy*, the Court considered whether California - a state with delegated enforcement authority under the Clean Water Act - was a proper party to bring a citizen suit under the Clean Water Act. As an initial matter, the court held that determining whether a State is authorized to bring a citizen suit under the Clean Water Act is not as simple as stating that the Clean Water Act allows citizen suits by "persons" and then determining that a State is included within the Clean Water Act's definition of a "person." *See id*. at 587. According to the district court, the broader provisions of the Clean Water Act citizen suit section "preclude the mechanical application of this geometrical theorem." *Id*.; *see also United States v. City of Hopewell*, 508 F. Supp. 526, 528-29 (E.D. Va. 1980).

The court therefore looked for guidance from case law addressing whether a State can properly bring a citizen suit when the State operates an enforcement program under federally-

delegated authority. The court found that very few courts had addressed this specific question and that in most of those cases, the courts' statements were mere dicta because it did "not appear that the State's status as a citizen was a contested issue." *California v. Dep't of Navy*, 631 F.Supp. at 589-90. Consequently, the Court looked to the Act's legislative history for guidance as to whether Congress intended to authorize a State citizen suit under circumstances in which a State with delegated enforcement authority opts instead to pursue a private, citizen suit. *Id*. at 590.

The district court observed that, with respect to the notice requirements of citizen suits, "[i]t makes little sense to require the state to provide **itself** with 60 days notice before it brings an action" *Id*. at 587 (emphasis in original). Moreover, the court noted that the Clean Water Act's citizen suit provision "was enacted precisely for the purpose of allowing citizens to sue on their **own behalf** when the state **fails** to perform its duty as the citizens' representative by bringing an enforcement action itself." *Id*. at 590 (emphasis in original). In addition to these "anomalies," the district court observed that

> construing "citizen" to include states would be inconsistent with the overall statutory scheme of the Act. The Act clearly envisions that the states will be the primary enforcers of the pollution laws and that the Administrator, and then "citizens," will bring suits against polluters only when a state fails to take appropriate action.

Id. at 588. In light of these observations, the court held that Congress did not intend to authorize State citizen suits by States with federally-delegated enforcement authority, and dismissed California's citizen suit accordingly. *See id*. at 590.

As with the Clean Water Act, a cursory reading of RCRA's citizen suit provision might initially suggest that the State of Oklahoma may bring a private citizen suit against Defendants. RCRA allows "any person" to bring a citizen suit, and the Act includes "States" within its

definition of the term "person." *See* 42 U.S.C. §§ 6972(a)(1)(B), § 6903(15), respectively. However, as in *California v. Dep't of Navy*, the authoritative cases addressing this question have done so only as dicta, and not in response to a direct challenge to whether a State with federally-delegated RCRA authority may properly bring a RCRA citizen suit. *See, e.g., United States Dep't of Energy v. Ohio*, 503 U.S. 607, 616 (1992) (stating, without analysis, that Ohio could bring a RCRA citizen suit but declaring that the only issue before the Court was "whether Congress has waived the National Government's sovereign immunity from liability for civil fines imposed for past failure to comply with the CWA, RCRA, or state law supplanting federal regulation.")

Therefore, like the court in *California v. Dep't of Navy*, this court should reject a mechanical, cursory reading of RCRA's citizen suit provision and, instead, determine that Congress did not intend to authorize a State citizen suit under circumstances such as those present here. As explained above, despite the fact that the State of Oklahoma has delegated RCRA enforcement authority, the State of Oklahoma has opted to pursue litigation instead of properly fulfilling its delegated duties. Congress created a citizen suit system designed to "trigger agency enforcement and avoid a lawsuit." *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943, 953 (9th Cir. 2002). Therefore, the State's RCRA citizen suit cannot be the type of litigation Congress intended to authorize under these circumstances. Consequently, like the court in *California v. Dep't of Navy*, this court should find that the State is not a proper party to bring a RCRA citizen suit and dismiss Count 3 of the State's First Amended Complaint accordingly. *See California v. Dep't of Navy*, 631 F.Supp. at 590 ("Because the State is not a 'citizen,' … it has no federal [citizen suit] cause of action…and the court therefore lacks jurisdiction…").

IV. CONCLUSION

For the reasons stated herein, the Tyson Defendants respectfully request this Court to enter an order dismissing Count 3 of Plaintiffs' First Amended Complaint for failure to state a claim upon which relief may be granted and/or for lack of subject matter jurisdiction. The Tyson Defendants further pray for such other and further relief as this Court deems just and equitable under the circumstances.

Respectfully submitted,

/s/ Stephen L. Jantzen
Patrick M. Ryan, OBA # 7864
Stephen L. Jantzen, OBA # 16247
RYAN, WHALEY & COLDIRON, P.C.
900 Robinson Renaissance
119 North Robinson, Suite 900
Oklahoma City, OK 73102
(405) 239-6040 (phone)
(405) 239-6766 (fax)

Thomas C. Green, *appearing pro hac vice*
Mark D. Hopson, *appearing pro hac vice*
Timothy K. Webster, *appearing pro hac vice*
Jay T. Jorgensen, *appearing pro hac vice*
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
(202) 736-8000 (phone)
(202) 736-8711 (fax)

Robert W. George, OBA #18562
KUTACK ROCK LLP
The Three Sisters Building
214 West Dickson Street
Fayetteville, AR 72701-5221
(479) 973-4200 (phone)
(479) 973-0007 (fax)

Attorneys for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2005, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson
OFFICE OF ATTORNEY GENERAL
State of Oklahoma
2300 N. Lincoln Blvd, Suite 112
Oklahoma City, OK 73105
ATTORNEY FOR PLAINTIFF

David Phillip Page
James Randall Miller
Louis Werner Bullock
MILLER KEFFER & BULLOCK
222 S KENOSHA
TULSA, OK 74120-2421
ATTORNEYS FOR PLAINTIFF

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
RIGGS ABNEY NEAL TURPEN
ORBISON & LEWIS
502 W 6th St
Tulsa, OK 74119-1010
ATTORNEYS FOR PLAINTIFF

Robert Allen Nance
Dorothy Sharon Gentry
RIGGS ABNEY NEAL TURPEN
ORBISON & LEWIS
5801 N Broadway
Ste 101
Oklahoma City, OK 73118
ATTORNEYS FOR PLAINTIFF

A. Scott McDaniel
Chris A. Paul
Nicole M. Longwell
Philip D. Hixon
Martin A. Brown
JOYCE, PAUL & MCDANIEL, P.C.
1717 South Boulder Ave., Ste 200
Tulsa, OK 74119
ATTORNEYS FOR PETERSON FARMS, INC.

Theresa Noble Hill
John H. Tucker
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE
POB 21100
100 W. 5th Street, Suite 400
Tulsa, OK 74121-1100
ATTORNEYS FOR CARGILL, INC., and CARGILL TURKEY PRODUCTION, INC.

R. Thomas Lay, Esq.
KERR, IRVINE, RHODES & ABLES
201 Robert S. Kerr Ave., Suite 600
Oklahoma City, OK 73102
ATTORNEYS FOR WILLOW BROOK FOODS, INC.

and I further certify that a true and correct copy of the above and foregoing will be mailed via regular mail through the United States Postal Service, postage properly paid, on the following who are not registered participants of the ECF System:

William H. Narwold
MOTLEY RICE LLC
20 Church St., 17th Floor
Hartford, CT 06103
ATTORNEYS FOR PLAINTIFF

Elizabeth C Ward
Frederick C. Baker
MOTLEY RICE LLC
28 Bridgeside Blvd
Mount Pleasant, SC 29464
ATTORNEYS FOR PLAINTIFF

C. Miles Tolbert
SECRETARY OF THE ENVIRONMENT
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

*/s/ Stephen L. Jantzen*___
STEPHEN L. JANTZEN